

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
Central Division

<p>SMITHFIELD FOODS, INC., MURPHY FARMS, LLC, and PRESTAGE-STOECKER FARMS, INC.,</p> <p>Plaintiffs,</p> <p>vs.</p> <p>THOMAS J. MILLER, Attorney General of the State of Iowa in his Official Capacity,</p> <p>Defendant.</p>	<p>Civil Action No. 4:02-CV-90324</p> <p>MEMORANDUM OF AUTHORITIES IN RESISTANCE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT FILED BY AMICUS CURIAE</p>
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COMES NOW the Iowa Pork Producers Association, the Iowa Farm Bureau Federation and the Iowa Farmers Union, as Amicus Curiae in Resistance to Plaintiffs' Motion for Summary Judgment on Counts I and III of Their Complaint for Declaratory Relief Pursuant to 42 U.S.C. section 1983, file the following Memorandum of Authorities with this Court.

ARGUMENT

I. IOWA CODE SECTION 9H.2 REGULATES THE OWNERSHIP, CONTROL AND OPERATION OF FEEDLOTS AND CONTRACT FEEDING OF SWINE IN IOWA BY PROCESSORS.

In their Motion for Summary Judgment and supporting documents, Plaintiffs challenge Iowa Code section 9H.2 as violating Article I, section 8, clause 3 of the United States Constitution. Specifically, Plaintiffs challenge section 9H.2 under this provision of the U.S. Constitution, the Commerce Clause, as state legislation improperly restricting interstate commerce – the dormant Commerce Clause. To properly consider the claims

of the Plaintiffs, a review of the origin and statutory history of current Iowa Code section 9H.2 is necessary.

Current Iowa Code section 9H.2 was first enacted in 1975 by the Iowa General Assembly with an effective date of August 15, 1975. *1975 Iowa Acts Ch. 133, sec. 2.*

This legislation also included provisions restricting the corporate ownership and leasing of farmland. *Id.* at section 4. Section 2 of the Act, in pertinent part, provided:

“In order to preserve free and private enterprise, prevent monopoly, and protect consumers, it is unlawful for any processor of beef or pork or limited partnership in which a processor holds partnership shares as a general partner or partnership shares as a limited partner, to own, control or operate a feedlot in Iowa in which hogs or cattle are fed for slaughter. . . .”

Beginning with this Act the Iowa General Assembly established a policy of restricting processors from getting involved in livestock production. The 1975 legislation impacted a processor only if the processor owned, controlled or operated a feedlot -- the legislation did not otherwise regulate processor ownership of livestock. Responding to changes in swine production and an increase in contract feeding of swine, the Iowa General Assembly in 1988 amended Iowa Code section 172C.2, in pertinent part, as follows:

“In order to preserve free and private enterprise, prevent monopoly, and protect consumers, it is unlawful for any processor of beef or pork or limited partnership in which a processor holds partnership shares as a general partner or partnership shares as a limited partner, to own, control or operate a feedlot in Iowa in which hogs or cattle are fed for slaughter. In addition, a processor shall not directly or indirectly control the manufacturing, processing, or preparation for sale of pork products derived from swine if the processor contracted for the care and feeding of swine in this state. However, this section does not apply to a cooperative association organized under chapter 497, 498, or 499, if the cooperative association contracts for the care and feeding of swine with a member of the cooperative association who is actively engaged in farming. This section does not apply to an association organized as a cooperative in which another cooperative association organized under chapter 497, 498, or 499 is a member, if the association contracts with a member which is a cooperative association

organized under chapter 497, 498, or 499 which contracts for the care and feeding of swine with a member of the cooperative who is actively engaged in farming.

”  
1988 Iowa Acts Ch. 1191, sec. 3.

This amendment prohibited pork processors from slaughtering or processing pork from swine the processor contract fed in Iowa. In addition, this amendment established two exemptions for cooperatives. First, cooperatives organized under Iowa law (**How about Federal Law**) were exempted if the cooperative contract fed swine with a member of the cooperative who was actively engaged in farming. Second, other cooperatives which contracted with members who were cooperatives organized under Iowa law were exempt if the Iowa cooperative contract fed swine with members who were actively engaged in farming.

**(Should we indicate a year here?)**As contract feeding of swine and arrangements with processors evolved, the Iowa General Assembly amended Iowa Code section 9H.2<sup>1</sup>, in pertinent part, as follows:

“In order to preserve free and private enterprise, prevent monopoly, and protect consumers, it is unlawful for any processor of beef or pork or limited partnership in which a processor holds partnership shares as a general partner or partnership shares as a limited partner, to own, control or operate a feedlot in Iowa in which hogs or cattle are fed for slaughter. In addition, a processor shall not directly or indirectly ~~control the manufacturing, processing, or preparation for sale of pork products derived from swine if the processor contracted~~ contract for the care and feeding of swine in this state. However, this section does not apply to a cooperative association organized under chapter 497, 498, ~~or 499~~, or 501, if the cooperative association contracts for the care and feeding of swine with a member of the cooperative association who is actively engaged in farming. This section does not apply to an association organized as a cooperative in which another cooperative association organized under chapter 497, 498, ~~or 499~~, or 501, is a member, if the association contracts with a member which is a cooperative association organized under chapter 497, 498, or 499 which contracts for the care

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<sup>1</sup> In 1993, Iowa Code Chapter 172C was transferred by the Code Editor to Iowa Code Chapter 9H. *Iowa Code Annotated*, sections 9H.1 through 9H.15.

and feeding of swine with a member of the cooperative who is actively engaged in farming. . . .”

*2000 Iowa Acts Ch. 1191, sec. 3. (Do you want to wait until here to emphasis the year?)*

This amendment prohibited processors of swine from contract feeding swine in Iowa even if another processor processed the swine. Secondly, this amendment prohibited processors from indirectly contract feeding swine in Iowa, e.g., a processor could not have an ownership interest in a company that contract fed swine in Iowa. Finally, the amendment added cooperatives formed under Iowa Code Chapter 501, called “value added cooperatives”, to the cooperative exception for processor contract feeding.

Finally, effective April 9, 2002, the Iowa General Assembly enacted Senate File 2309. This legislation was once again in response to changing swine production arrangements and a concern that processors were entering into swine production arrangements in Iowa which circumvented the purposes of Iowa Code Chapter 9H.2. Senate File 2309 amended Iowa Code section 9H.2, in pertinent part, as follows:

~~In order to~~ The purpose of this section is to preserve free and private enterprise, prevent monopoly, and also to protect consumers, it is unlawful for any.

1. Except as provided in subsections 2 through 4, and section 9H.2A, all of the following apply:

a. For cattle, a processor of beef or pork or limited partnership in which a processor holds partnership shares as a general partner or partnership shares as a limited partner, or limited liability company in which a processor is a member, to shall not own, control, or operate a feedlot cattle operation in Iowa in which hogs or cattle are fed for slaughter this state.

b. For swine, a processor shall not do any of the following:

(1) (a) Directly or indirectly own, control, or operate a swine operation in this state.

(b) Finance a swine operation in this state or finance a person who directly or indirectly contracts for the care and feeding of swine in this state.

For purposes of subparagraph subdivision (a) and this subparagraph subdivision, all of the following apply:

(i) "Finance" means an action by a processor to directly or indirectly loan money or to guarantee or otherwise act as a surety.

(ii) "Finance" or "control" does not include executing a contract for the purchase of swine by a processor, including but not limited to a contract that contains an unsecured ledger balance or other price risk sharing arrangement. "Finance" also does not include providing an unsecured open account or an unsecured loan, if the unsecured open account or unsecured loan is used for the purchase of feed for the swine and the outstanding amount due by the debtor does not exceed five hundred thousand dollars. However, the outstanding amount due to support a single swine operation shall not exceed two hundred fifty thousand dollars.

(c) Obtain a benefit of production associated with feeding or otherwise maintaining swine, by directly or indirectly assuming a morbidity or mortality production risk, if the swine are fed or otherwise maintained as part of a swine operation in this state or by a person who contracts for the care and feeding of swine in this state.

(d) Directly or indirectly receive the net revenue derived from a swine operation in this state or from a person who contracts for the care and feeding of swine in this state.

(2) ~~In addition, a processor shall not directly~~ Directly or indirectly contract for the care and feeding of swine in this state. However, this ~~section~~ subparagraph does not apply to a cooperative association organized under chapter 497, 498, 499, or 501, if the cooperative association contracts for the care and feeding of swine with a member of the cooperative association who is actively engaged in farming. This ~~section~~ subparagraph does not apply to an association organized as a cooperative in which another cooperative association organized under chapter 497, 498, 499, or 501 is a member, if the association contracts with a member which is a cooperative association organized under chapter 497, 498, 499, or 501, which contracts for the care and feeding of swine with a member of the cooperative who is actively engaged in farming. . . ."

*2002 Iowa Acts Senate File 2309.*

Senate File 2309 prohibits a processor of swine from indirectly owning, controlling, or operating a swine operation. In addition, a processor is prohibited from directly or indirectly financing a swine operation or anyone who contract feeds swine in Iowa, directly or indirectly benefiting from production of swine in Iowa by assuming morbidity or mortality production risk, or directly or indirectly receiving net revenues from a swine operation or anyone who contract feeds swine in Iowa. The legislation amended the definition of processor to include as persons deemed to be processors anyone with a minimum ownership percentage according to a graduated percentage scale

and anyone who is a member of a board of directors of a processor which processes more two hundred and sixty million dollars in annual wholesale value of pork products, including for two years after leaving the board of directors.

The constitutionally relevant points from this review of the history of Iowa Code section 9H.2 will be addressed in detail in this Memorandum. However, at the outset it is important to note that Iowa Code section 9H.2 does not, and never has, regulated the business of processing beef or pork products. Iowa Code section 9H.2 only regulates a processor's livestock production activities. Secondly, the law, by its express terms, has always regulated a processor's livestock production activities only if those activities occur in Iowa. If a processor does not engage in the proscribed livestock production activities in Iowa, section 9H.2 does not apply. A processor may engage in livestock production activities outside Iowa without any consequences under section 9H.2. Since 1975, the Iowa General Assembly's goal with what is now section 9H.2 has been to "preserve free and private enterprise, prevent monopoly and protect consumers" by encouraging processors to process livestock and livestock products -- but not become livestock producers themselves in the state of Iowa.

II. IOWA CODE SECTION 9H.2 PROPERLY PROMOTES THE LEGISLATIVE GOALS OF PRESERVING FREE AND PRIVATE ENTERPRISE, PREVENTING MONOPOLY AND PROTECTING CONSUMERS.  
**(Incorporate the words Public Good?)**

At the heart of the Iowa General Assembly's purposes of preserving free and private enterprise, preventing monopoly, and protecting consumers is the goal of encouraging free and open market access in livestock production in Iowa by prohibiting processors from engaging in livestock production. Processor ownership of livestock presents many problems for maintaining an open marketing system. *See generally*, Roger

A. McEowen, et. al., *The 2002 Senate Farm Bill: The Ban on Packer Ownership of Livestock*, 7 Drake J. of Agric. L. 267 ( forthcoming 2002) (manuscript on file with Drake J. of Agric. L.) ~~While the article focuses on the proposed federal legislation, it~~ **and begins with a general discussion of the reasons the legislation is needed. The authors of this article discuss federal legislation proposed in 2002 to ban meatpackers from owning or controlling livestock production. While the article** ~~focusing on the proposed federal legislation, it begins with a general discussion of the reasons the legislation is needed. In responding~~ **the article responds to critics who suggested federal legislation would not be workable the article and notes that several significant livestock producing states, including Iowa, have legislation comparable to the proposed federal legislation and that significant problems have not occurred in those states. Id. (manuscript at 21,29,39). Thus, the article's analysis of the concerns with packer livestock production is particularly noteworthy in this discussion of Iowa Code section 9H.2.**

The meatpacking industry has consolidated rapidly over the last twenty years. *Id.* (manuscript at 3). During the earlier part of this period consolidation was primarily horizontal. *Id.* (manuscript at 4). However, recently vertical integration has progressed rapidly. *Id.* (footnotes omitted). This consolidation is evidenced by processors entering into livestock production, entering into long-term contracts to secure livestock production, and securing opportunities for further processing of livestock after slaughter. *Id.* (manuscript at 4-5) (footnotes omitted). "This consolidation has led to serious concerns of an imbalance of power between meatpackers and independent producers." *Id.* (manuscript at 5) (footnotes omitted). As a market moves becomes more

monopolistic, downward pressure on price paid to sellers results. *Id.* (manuscript at 8) (footnotes omitted). Although both horizontal and vertical consolidation cause concern, consolidation by vertical integration is precisely what the Iowa General Assembly is **(and was?)** attempting to prevent with the prohibitions on processor livestock production activities in section 9H.2.

Consolidation causes **public** concern because as the meatpacking industry structure consolidates both vertically and horizontally, efficiency gains are less likely to be passed on to either farmers or consumers. *Id.* (manuscript at 5). The authors state:

“It is important to note that vertical and horizontal integration benefits consumers only if any economies derived from the integration are passed on to consumers. That outcome is likely only if competition is present and competitive markets are functioning well. Instead, any efficiency gains could be passed on to shareholders or used to pad costs within the firm. In any event, the higher the level of concentration and vertical integration, the greater the risk of unacceptable market conduct.”

*Id.* (manuscript at 5, FN 17).

It is this “risk of unacceptable market conduct” that Iowa Code section 9H.2 is intended to avoid. For example, in August of 2001, 83% of hogs in the U.S. were committed to packers under either direct packer ownership or contract arrangement. *Id.* (manuscript at 9). Under this scenario, there is an opportunity for packers to manipulate the open market “due to their position as dominant buyers combined with the decreasing volume of those markets.” *Id.* (footnote omitted). This is particularly true because cash markets serve as the **transparent** price setting mechanism **for most if not all** packer marketing agreements. *Id.* (manuscript at 10). “Thus, if the cash market declines, packers pay less for livestock whether procured through the cash market or contract.” *Id.* (manuscript at 11) (footnote omitted). Another example of “risk of unacceptable conduct” to be avoided by Iowa Code section 9H.2, the authors note that when packers

own and raise livestock they can market that livestock not only through their own packing operations (vertical integration) but they can also sell their livestock to other packers. *Id.* (manuscript at 12). In doing so, they can **greatly** affect market prices and they can **directly** communicate ~~that~~ **the prices paid** to each other. *Id.* (manuscript at 12-13). The General Assembly's 2000 amendment to Iowa Code section 9H.2 recognized the potential for that situation and took steps to prevent it. See discussion under brief point I at page @ of this Memorandum.

By prohibiting processors from becoming involved in livestock production, the Iowa General Assembly has reduced vertical integration which has reduced the monopolistic tendencies of the livestock market in Iowa, preserved free and private enterprise by opening markets for livestock producers and benefited consumers with lower food prices and by keeping independent producers in livestock production.

III. NEITHER TENET OF THE DORMANT COMMERCE CLAUSE RAISED BY PLAINTIFFS IN THEIR MOTION IS VIOLATED BY IOWA CODE SECTION 9H.2 BECAUSE IT DOES NOT REGULATE LIVESTOCK PRODUCTION BY A PROCESSOR OUTSIDE IOWA AND BECAUSE IT REGULATES PROCESSOR LIVESTOCK PRODUCTION EQUALLY FOR IN-STATE AND OUT-OF-STATE PROCESSORS.

Plaintiffs raise two challenges to Iowa Code section 9H.2, in their Motion for Summary Judgment.<sup>2</sup> First, Plaintiffs allege that Iowa Code section 9H.2 “demands that plaintiffs conform their out-of-state business operations according to in-state terms or restrictions”, i.e., they allege that the law has “extraterritorial reach.” Plaintiffs’ Memorandum of Points and Authorities, p. 12, see *Cotto Waxo Company v. Williams*, 46 F.3d 790, 793 (8<sup>th</sup> Cir. 1995)(“The Commerce Clause precludes application of a state

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<sup>2</sup> While Plaintiffs have challenged other tenets of the Dormant Commerce Clause in this case, these are the only two at issue in their Motion for Summary Judgment.

statute to commerce that takes place wholly outside of the state's borders." (citation omitted). Second, Plaintiffs allege that the law discriminates against Smithfield by allowing cooperatives organized under Iowa law or that contract with cooperatives organized under Iowa law to vertically integrate. Plaintiffs' Memorandum of Points and Authorities, p.8-9, *Id.* ("If the challenged statute discriminates against interstate transactions "either on its face or in practical effect," it burdens interstate commerce directly and is subject to strict scrutiny.")(citations omitted).

These two challenges to Iowa Code section 9H.2 under the dormant Commerce Clause are sometimes called "first tier" challenges. See *South Dakota Farm Bureau, et. al. v. Hazeltine*, 202 F.Supp.2d 1020, 1045 – 1049 (Dist. So. Dak. 2002). A "second tier" analysis, which is not at issue in Plaintiffs' Motion for Summary Judgment, is used when a state statute indirectly affects interstate commerce and regulates evenhandedly. *Id.* at 1045. Using this approach a court determines whether there is a legitimate state interest and weighs the burden on interstate commerce with putative local benefits. *Id.* citing *Cotto Waxo*, 46 F.3d at 793.

Plaintiffs cite to *South Dakota Farm Bureau v. Hazeltine* for the proposition that the court in that case struck down a South Dakota statute "remarkably similar" to Iowa Code section 9H.2 that was "designed to prohibit large corporations, which already largely control the ultimate processing and distribution of agricultural commodities, from vertically integrating an industry to the competitive exclusion of the traditional family farmer." Plaintiffs' Memorandum of Points and Authorities, p. 6 & p. 13, quoting *South Dakota Farm Bureau v. Hazeltine*, 202 F.Supp.2d at 1049. It is correct that the court in that case struck down the South Dakota statute. *Id.* at 1050. However, the court

bypassed the “first tier” approach and used the “second tier” approach to invalidate the statute. *Id.* (“The court, however, need not cross the ‘first tier bridge’ and chooses to rely on the so-called ‘second tier’ approach, the *Pike v. Bruce Church, Inc.* balancing test.”) Thus, Plaintiffs’ reliance on this case is misplaced in this Motion for Summary Judgment where the “second tier” is not at issue. In addition, the court followed the language quoted by Plaintiffs with a quote from *State ex rel Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d 801, 806 (Mo. 1988) **(Is this the correct date?)** stating that it is within a legislature’s power and rationally related to a legitimate state interest “. . . to enact a statute which regulates the balance of competitive economic forces in the field of agricultural production and commerce, thereby protecting the welfare of its citizens comprising the traditional farming community. . .” *Id.* at 1049. Although the court did not rule on the “first tier” challenge, and although the court ultimately struck down the statute under the “second tier”, the court did not use the language quoted by Plaintiffs to invalidate the statute and Plaintiffs’ use of that portion of the case to support their “first tier” challenge is incorrect and misleading.

A. IOWA CODE SECTION 9H.2 DOES NOT REGULATE LIVESTOCK PRODUCTION BY A PROCESSOR OUTSIDE OF IOWA – THEREFORE THE LAW DOES NOT HAVE EXTRATERRITORIAL REACH.

Plaintiffs allege: “Because Iowa Code §9H.2 dictates that plaintiffs cannot contract for the care and feeding of swine in Iowa if they process non-Iowa hogs outside of the State of Iowa, the unconstitutionality of this statute under established dormant Commerce Clause jurisprudence is not subject to reasonable dispute.” Plaintiffs’ Memorandum of Points and Authorities, p. 13.

Plaintiffs’ argument misses the mark in that the regulatory function of section

9H.2 is contract feeding of swine in Iowa – not the conducting of processing operations. Processors such as Plaintiffs may conduct processing operations outside of Iowa and in Iowa without coming under the purview of section 9H.2. It is only when processors conduct the prohibited swine production activities in Iowa that section 9H.2 comes into play. If section 9H.2 attempted to regulate contract feeding outside of Iowa, plaintiffs argument may have merit.

This very analysis was clearly laid out in *Hampton Feedlot, Inc., et. al. v. Nixon*, 249 F.3d 814 (8<sup>th</sup> Cir. 2001), a case that Plaintiffs failed to even mention in their Memorandum. In that case the court ruled on a Missouri statute enacted to eliminate price discrimination in the purchase of Missouri livestock *Hampton Feedlot, Inc., et. al. v. Nixon*, 249 F.3d at 817. The statute provided, in pertinent part: “A packer purchasing or soliciting livestock in this state for slaughter shall not discriminate in prices paid or offered to be paid to sellers of that livestock.” *Id.* (emphasis added).<sup>3</sup> The court distinguished a South Dakota statute where “the statute was intended to apply to livestock slaughtered in South Dakota, regardless of where the livestock was purchased, resulting in South Dakota’s regulation of cattle sales in other states.” *Hampton Feedlot, Inc., et. al. v. Nixon*, 249 F.3d at 818. (emphasis added). Because the South Dakota statute required livestock purchased outside of South Dakota to be purchased in accordance with the South Dakota statute if the livestock were to be slaughtered in South Dakota, the district court ruled the statute was unconstitutional due to its “extraterritorial reach.” *Hampton Feedlot, Inc., et. al. v. Nixon*, 249 F.3d at 818 - 819. The *Hampton Feedlot* court noted that the “Missouri statute, on the other hand,

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<sup>3</sup> The emphasized phrase “in this state” is used repeatedly in Iowa Code section 9H.2 by the Iowa General Assembly to make it clear that Iowa’s law does not have “extraterritorial reach.”

only regulates the sale of livestock sold in Missouri.” *Hampton Feedlot, Inc., et. al. v. Nixon*, 249 F.3d at 819. The offending extraterritorial reach of the South Dakota statute was not present in the Missouri statute because it applied only to commerce in Missouri. *Id.*

Like the Missouri anti-price discrimination statute interpreted in *Hampton Feedlot*, Iowa Code section 9H.2 only regulates livestock production by processors in Iowa. The statute is indifferent to swine production conducted by processors out-of-state. See *Hampton Feedlot, Inc., et. al. v. Nixon*, 249 F.3d at 819 quoting *Cotto Waxo Co. v. Williams*, 46 F.3d at 794. In fact, under section 9H.2 a processor may contract feed hogs outside of Iowa and bring those hogs into Iowa to be processed. Section 9H.2 would not regulate this transaction and therefore it would be in accordance with the holding and analysis of *Hampton Feedlot, Inc., et. al. v. Nixon* finding the Missouri statute to not have “extraterritorial reach.”

Plaintiffs seem to imply that Iowa Code section 9H.2 has extraterritorial reach by requiring Smithfield to conduct its out-of-state commerce according to in-state terms. See Plaintiffs’ Memorandum of Points and Authorities, p. 13. This implication is an overbroad reading of the cases on “extraterritorial reach.” The only effect of 9H.2 on processing itself is to consider processing operations, wherever they occur, to determine if the processor meets the definition of processor in section 9H.1 and is therefore subject to section 9H.2’s restrictions on swine production in Iowa. *Iowa Code section 9H.1(19)(2001 as amended by S.F. 2293)*. That definition considers processing activities equally within and outside Iowa. More importantly, that definition is simply that, a definition. It is not a regulatory provision and does not require a processor to

comply with its restrictions on contract feeding or swine operation control outside of Iowa.

In *Hampton Feedlot, Inc. v. Nixon*, the challengers of the constitutionality of the statute claimed that the statute had a chilling effect on interstate commerce because it discouraged out-of-state packers from doing business in Missouri. *Hampton Feedlot, Inc., et. al. v. Nixon*, 249 F.3d at 819. The court disagreed and ruled there was no chilling effect on interstate commerce “if packers can just as easily purchase Nebraska or Kansas livestock for slaughter if they do not purchase Missouri livestock.” *Id.* The court, in ruling the Missouri statute did not discriminate nor did it attempt to regulate out-of-state commerce, found the Missouri statute “affects the flow of interstate commerce but it does not burden interstate commerce.” *Id.* citing *Cotto Waxo v. Williams*, 46 F.3d at 794. This analysis applies to Plaintiffs’ claim here. Iowa Code section 9H.2 may affect the flow of interstate commerce in that processors who meet the definition in section 9H.2 can just as easily engage in livestock production activities in other states if they do not engage in livestock production in Iowa due to the prohibitions on such activities in Iowa by Iowa Code section 9H.2. But Iowa Code section 9H.2 does not have the requisite “extraterritorial reach” to unconstitutionally burden interstate commerce.

**B. BECAUSE IOWA CODE SECTION 9H.2 REGULATES PROCESSOR LIVESTOCK PRODUCTION EQUALLY FOR IN-STATE AND OUT-OF-STATE PROCESSORS, IT DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE.**

If a state statute is enacted for a discriminatory purpose or discriminates against interstate transactions on its face or in practical effect, the statute directly burdens interstate commerce and is subject to strict scrutiny. *Cotto Waxo Company v. Williams*,

46 F.3d at 793. Under strict scrutiny, a state statute must serve a legitimate local purpose, not related to economic protectionism, which may not be accomplished by nondiscriminatory means. *Id.*

Plaintiffs allege that Iowa Code section 9H.2 discriminates against them because it bans them from vertically integrating in Iowa while at the same time allowing Iowa farmer through Iowa based cooperative associations to vertically integrate. See Plaintiffs' Memorandum of Points and Authorities, p. 11. That, the Plaintiffs argue, violates the dormant Commerce Clause.

Discrimination for purposes of the Commerce Clause means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* at 794. The provision of the law that Plaintiffs find offensive under Commerce Clause analysis is the exemption to the prohibition on processor contract feeding of swine in Iowa. This prohibition does not apply to a cooperative organized under Iowa cooperative law if the cooperative contracts for the care and feeding of swine with a member of the cooperative who is actively engaged in farming. This prohibition also does not apply to a cooperative in which another cooperative organized Iowa cooperative law is a member, if the cooperative contracts with the cooperative organized under Iowa law which in turn contracts for the care and feeding of swine with a member of the cooperative who is actively engaged in farming. *2002 Iowa Acts Senate File 2309.*

First, putting aside the exemption for cooperatives, the prohibition on processor's contract feeding swine applies equally to in-state and out-of-state processors. Iowa Code section 9H.2 does not favor in-state processors who are not

cooperatives over out-of-state processors who are not cooperatives. This is noteworthy because there is no evidence that Smithfield is a cooperative and therefore the exemption for cooperatives is of no direct consequence to Plaintiffs in this case. In other words, because Plaintiffs are not cooperatives they cannot show a burden on them from differential treatment of an in-state economic interest. *Cotto Waxo Company v. Williams*, 46 F.3d at 794.

More importantly, by law cooperatives are formed as a mutual endeavor by its members with the goal of adding value to members' production and returning the net earnings to the members. @ Thus, the exemption for contract feeding by processors who are cooperatives in Iowa or who contract with Iowa cooperatives is distinguishable in that the livestock producers who invest in the cooperative receive additional benefits from the processing activities of the cooperative. This is a laudable and proper goal of cooperatives that benefits Iowa livestock producers without unduly burdening out-of-state economic interests.

However, if the court determines the exemption for cooperatives in Iowa Code section 9H.2 is discriminatory and must fail under strict scrutiny, the Court may sever this portion of section 9H.2 without affecting the remainder of the statute. Iowa Code section 4.12 (2001) ("If any provision of an Act or statute or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act or statute which can be given effect without the invalid provision or application, and to this end the provisions of the Act or statute are severable.")

As amended by Senate File 2309 in 2002, Iowa Code section 9H.2 reads in

pertinent part:

“1. Except as provided in subsections 2 through 4, and section 9H.2A, all of the following apply:

. . . .

b. For swine, a processor shall not do any of the following:

. . . .

(2) Directly or indirectly contract for the care and feeding of swine in this state. However, this subparagraph does not apply to a cooperative association organized under chapter 497, 498, 499, or 501, if the cooperative association contracts for the care and feeding of swine with a member of the cooperative association who is actively engaged in farming. This subparagraph does not apply to an association organized as a cooperative in which another cooperative association organized under chapter 497, 498, 499, or 501 is a member, if the association contracts with a member which is a cooperative association organized under chapter 497, 498, 499, or 501, which contracts for the care and feeding of swine with a member of the cooperative who is actively engaged in farming.” (emphasis added).

If the exemption is held to be invalid because the Court determines it violates the dormant Commerce Clause, the exemption may be severed and the remainder of section 9H.2 remain valid because the remainder of the section can easily be given effect without the invalid exemption. Iowa Code section 4.12 (2001).

#### CONCLUSION

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Respectfully submitted,

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